No. 47157-4-II

Pierce County No. 94-1-02719-8

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

N.N.,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Stanley Rumbaugh, Resentencing Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. RCW 10.95.030 violates the Sixth Amendment and Article I, §§ 21 and 22 rights to trial by jury and state and federal due process in light of Alleyne v. United States, __ U.S. __, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), and resentencing is required.

2. N.N.'s Eighth Amendment rights under Miller v. Alabama, __ U.S. __, 132 S. Ct. 2455, 183 L. Ed.2d 407 (2012), were violated when the lower court imposed an exceptional minimum term of life without the possibility of parole after failing to properly consider all the mitigating factors of youth. The resulting sentences are "death equivalent" and must be reversed as cruel and unusual punishment.

3. The resentencing court failed to comply with the requirements of RCW 10.95.030 and the mandates of Miller and due process by applying an effective presumption of reimposing life without parole and placing a burden on N.N. to present sufficient mitigating evidence to prove he deserved something less.

4. The resentencing court was improperly swayed by the prosecutor's misstatements of the Miller factors and the entire nature of the proceeding.

5. The court erred in finding that the principles of Miller did not apply when a juvenile offender was sentenced to die in prison with no hope of release if that sentence was based upon application of mandatory adult sentencing provisions regarding consecutive sentencing instead of mandatory application of a life without parole sentence.

6. To the extent RCW 10.95.030 can be construed to authorize the imposition of an "effective life" term consisting of multiple consecutive terms without requiring the consideration of the transient and mitigating qualities of youth, it is in violation of Miller and the Eighth Amendment.

7. Appointed counsel below were prejudicially ineffective in violation of N.N.'s Sixth Amendment and Article 1, § 22 rights in failing to properly prepare, present and argue against the death equivalent sentence sought by the state.

8. On remand, new counsel should be appointed and the hearing held before a new judge in order to ensure the

appearance of fairness and N.N.'s rights to effective assistance are honored.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Any factors supporting increased punishment above that authorized by a jury's verdict must be proven to a jury, beyond a reasonable doubt. Under Alleyne, this applies to the setting of both an exceptional maximum or minimum prison term.

Does RCW 10.95.030 violate these requirements, due process and the state and federal rights to trial by jury by authorizing a judge instead of a jury to increase punishment upon consideration of certain factors, without requiring the prosecution to prove the relevant facts beyond a reasonable doubt?

2. Under Miller v. Alabama, supra, the Eighth Amendment prohibits as cruel and unusual punishment any term of life without parole automatically imposed for even the most heinous crime, homicide, if the offender was younger than 18. Further, such a sentence amounts to a death equivalent and must be imposed only in the rarest of cases, where even strong mitigating factors common to all youth are overcome by evidence of "irreparable corruption," found after examining multiple factors (the "Miller" factors).

Under RCW 10.95.030 as amended to comply with Miller, a court must impose a 25-year minimum and a life with parole maximum as the presumptive sentence for an aggravated first-degree murder. The court may only exceed that sentence after consideration of the Miller factors.

a. Did the resentencing court err and apply an improper standard in violation of the Eighth Amendment and Miller by applying an effective presumption that life without parole would be reimposed unless N.N. met the burden of presenting sufficient evidence in mitigation to show he deserved a lesser sentence?

b. Does the court's application of the wrong standards and theories about the very nature of the hearing and the judge's role invalidate all of his subsequent findings?

c. Did the court fail to properly consider the Miller factors by dismissing "age" as irrelevant because N.N. was almost 18, failing to fully consider all of the factors and giving almost exclusive weight to the judge's inability to understand how anyone could have committing the

crimes?

d. Were counsel prejudicially ineffective in failing to provide sufficient argument and evidence in an effort to meet the state's efforts to impose a death-equivalent sentence?

e. Did the court err in refusing to apply the principles of Miller to the application of mandatory adult sentencing procedures regarding consecutive sentences even though the result was a cumulative sentence of effective life without the possibility of parole for a juvenile crime?

9. On remand, a new judge and new counsel should be appointed to ensure the appearance of fairness and ensure that N.N.'s rights are not further violated in this case which will decide whether he ever sees the outside of a prison before he dies.

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant N.N. was 17 in 1994 when he was charged in adult court with taking a motor vehicle without permission and as an accomplice with S.M. and O.I. with two counts of first-degree murder (charged in the alternative) with aggravating circumstances and two counts of first-degree assault, also with aggravating circumstances. CP 1-5; RCW 9A.08.020; former RCW 9A.32.030(1)(a) and (b)(1994); RCW 9A.36.011(1)(a); former RCW 10.95.020(8) (1994). After jury trial in adult court, the jury acquitted N.N. of having committed the murders with "extreme indifference to human life" but found him guilty of the crimes as premeditated and of all the other crimes and circumstances. CP 6-16. N.N.'s appeal was unsuccessful and the mandate issued on June 17, 1999. CP 28-29.

On June 21, 2013, N.N. filed a personal restraint petition in the

state Supreme Court arguing that he was entitled to resentencing under Miller v. Alabama, supra. After the case was transferred to the court of appeals, Division Two, the Pierce County Prosecutor's Office began proceedings in superior court and the PRP was stayed. See CP 45.

Resentencing proceedings were held before the Honorable Stanley J. Rumbaugh on August 8 and November 14, 2014 and January 23, 2015.[1] Judge Rumbaugh then imposed two separate exceptional terms of life without the possibility of parole, running them consecutive to each other and to terms of 136 months, 123 months and 8 months all running consecutive and imposed on the other counts. CP 92-94. N.N. appealed and this pleading follows. See CP 89-94.

2. Overview of facts of the incident/charges

More than 20 years ago, in late August of 1994, four high-school age boys drove a car down a street in Tacoma, Washington, throwing eggs and other items at the houses and on the road as they passed. Insyxiengmay v. Morgan, 403 F.3d 657, 661 (9th Cir. 2005).[2] They also threw eggs at a house where several people were standing outside; juveniles I.O., S.M. and N.N.. N.N. was then 17 years old and all three

[1]The verbatim report of proceedings consists of three volumes, which will be referred to as follows: the proceedings of August 8, 2014, as "1RP;" the proceedings of November 14, 2014, as "2RP;" the proceedings of January 23, 2015, as "3RP."

[2]This statement of facts is taken from this Court's unpublished decision in the joint appeal of N.N. and O.I., State v. Insyxiengmay/Ngoeung, 93 Wn. App. 1030 (1998), and the 9th Circuit's recitation of the facts in O.I.'s *habeas corpus* action brought based on the same trial record, Insyxiengmay v. Morgan, 403 F. 3d 657 (2005); see State v. Seek, 109 Wn. App 876, 878 n. 1, 37 P.3d 339 (2002) (citation for such purposes regarding previous relevant proceedings does not violate the prohibition on citation of unpublished opinions as "authority" in the appellate court). I.O.'s petition for writ of *habeas corpus* was ultimately dismissed and the dismissal was affirmed. Insyxiengmay v. Morgan, 245 Fed. Appx. 693 (2007).

boys were members of the same street gang. Id.; see State v. Insyxiengmay/Ngoeung, 93 Wn. App. 1030 (1998).

Believing the attack was gang-related, O.I. ran into the house, grabbed the homeowner's rifle, came back out and opened the car door, telling S.M. to get in. 403 F.3d at 662; Insyxiengmay, 93 Wn. App. 1030. S.M. would later testify that O.I. repeatedly said, "I'm going to get 'em." Morgan, 403 F.3d at 662-63. N.N. was driving. Id.

Initially, O.I. claimed it was a fourth boy in the car who had leveled the rifle out the car window at the other car, fired repeatedly and killed the driver and front seat passenger, R.F. and M.W., both 17 years old. Id. Two other boys in the care were not hurt.

Both S.M. and N.N. initially went along with O.I.'s claim of a fourth person in the car. Id. After police falsely told S.M. that O.I. had told them S.M. was the shooter, however, S.M. then identified O.I. as the one with the gun. Id. After they returned to the home, O.I. handed the gun to a friend there, telling her to get rid of it and saying something like, "[w]e shot them up. They threw eggs at us, the Rickets. We shot them up." Id.

N.N. was arrested several days after the incident and admitted driving the car, but said he had only learned that O.I. had a gun after they left and was not aware O.I. was going to shoot. Insyxiengmay, 93 Wn. App. 1030 (1998). N.N. was convicted of two counts of aggravated first-degree murder and two counts of first degree assault for the incident, as well as taking a motor vehicle without permission. CP 6-16.

At the original sentencing in 1995, the judge said she would have

imposed life without parole even if she had discretion, because she believed that sentencing "focuses on the victims." See CP 105-106. She also believed she was to impose "the punishment that is appropriate in light of the harm caused to the victims." Id. In addition, she made it clear that the goal was not to try to rehabilitate N.N. or make him better but simply to punish him and protect society. Id.

D. ARGUMENT

REVERSAL AND REMAND FOR RESENTENCING BEFORE A NEW JUDGE WITH NEW COUNSEL, A JURY AND PROOF BEYOND A REASONABLE DOUBT IS REQUIRED

In 2012, in Miller v. Alabama, the U.S. Supreme Court found that automatic or mandatory imposition of a sentence of life without the possibility of parole on a person who committed even the most heinous of crimes as a youth violates the Eighth Amendment prohibition on cruel and unusual punishment. Miller, supra.

Nearly 20 years before, in 1994, appellant N.N. was 17 years old when he drove the car that O.I. rode in and shot from, killing the two victims in the car ahead. Despite his age, after "automatic decline" to adult court, N.N. was convicted as an accomplice to O.I. of two counts of aggravated first-degree murder and two counts of first-degree assault, with an additional charge as a principal for taking a motor vehicle without permission. CP 6-16. In 1995, the prevailing norms treated juveniles as "little adults," and N.N. received two mandatory terms of life without the possibility of parole for the first-degree murder charges, as well as terms of 136 months for count III, 123 months for count IV, and 8 months for count V, all running consecutive. CP 25-26.

After Miller was decided, N.N. filed a personal restraint petition in the Supreme Court, asking for resentencing pursuant to Miller. While that PRP was pending, however, in 2014, the Washington legislature enacted a series of legislative reforms, commonly called the "Miller fix," which included a requirement that all youth sentenced under the former mandatory statutory scheme were entitled to resentencing. See Laws of 2014, ch. 130; see also, In re McNeil, 181 Wn.2d 582, 334 P.3d 548 (2014) (discussing the "Miller fix"). The Pierce County prosecutor's office started proceedings in superior as required by the "Miller fix" and this appeal is from the result.

1. N.N. WAS DEPRIVED OF HIS RIGHTS TO TRIAL BY JURY AND DUE PROCESS WHEN THE RESENTENCING COURT IMPOSED A GREATER SENTENCE THAN AUTHORIZED BY THE JURY'S VERDICTS ; RCW 10.95.030(3) IS UNCONSTITUTIONAL UNDER ALLEYNE

In Miller, supra, the U.S. Supreme Court held that it was a violation of the 8th Amendment prohibitions against cruel and unusual punishment to allow automatic or mandatory imposition of a sentence of life without the possibility of parole on a person who was a juvenile when the crime or crimes occurred. 132 S. Ct. at 2468. In response, the Washington legislature has amended our state's sentencing statutes to try to ensure that our laws comply with the constitutional mandates of Miller. See Laws of 2014, ch. 130 (the "Miller fix"); Laws of 2015, ch. 134 (the "Miller fix 2.0"). Those statutes were not applied consistent with those mandates below. See argument 2, *infra*. But as an initial matter, the entire procedure below was flawed and reversal and remand is required,

because RCW 10.95.030 violates the state and federal due process clauses and the 6th Amendment and Article I, §§ 21 and 22, rights to trial by jury.

Both the state and federal constitutions guarantee the right to due process and jury trial, both of which "requires that a sentence be authorized by the jury's verdict." State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.3d 913 (2010); see, Blakely v. Washington, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Under these rights, other than the fact of a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); see Williams-Walker, 167 W.2d at 896. Since 2004 it has been well-settled that the statutory maximum in question is "the maximum a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*" rather than the statutory maximum authorized for the crime. See Blakely, 542 U.S. at 303 (emphasis in original).

Our state constitution provides greater protection for jury trials than does the federal clause. See Williams-Walker, 167 Wn.2d at 896. Under both, however, the rights are violated if the sentencing court imposes greater punishment than that authorized solely based on the facts actually found by a jury, beyond a reasonable doubt. See State v. Recuenco, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (Recuenco III); Blakely, 542 U.S. at 303.

Thus, when the prosecution seeks to have a court impose a

sentence above the standard range (an "exceptional" sentence), the relevant facts must be proven to and found by a jury, beyond a reasonable doubt. See, State v. Ortega, 131 Wn. App. 591, 594-95, 128 P.3d 146 (2006), review denied, 160 Wn.2d 1002 (2007); see RCW 9.94A.537; Blakely, 542 U.S. at 303. Further, these rules apply to "circumstances in aggravation ***or*** mitigation," if the relevant facts "expose a defendant to a greater potential sentence." Cunningham v. California, 549 U.S. 270, 281, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007).

In Alleyne, decided in 2013, the U.S. Supreme Court reversed its own decision from 11 years before, in Harris v. United States, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002), overruled by Alleyne, supra. Alleyne, 133 S. Ct. at 2159-63. In Harris, the Court had found that the principles of Apprendi did not apply and the Sixth Amendment and due process did not require that facts relied on to set a higher mandatory minimum sentence had to be proven to a jury, beyond a reasonable doubt. See Harris, 536 U.S. at 557-58; see also, Alleyne, 133 S. Ct. at 2159-63.

Revisiting the issue in Alleyne, the Court rejected the reasoning of Harris, finding it inconsistent not only with prior caselaw but with "the original meaning of the Sixth Amendment." 133 S.Ct. at 2155-56. The Alleyne Court declared:

> In Apprendi, we held that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed. While Harris declined to extend this principle to facts increasing mandatory minimum sentences, Apprendi's definition of "elements" necessarily includes not only fact that increase the ceiling, but also those that increase the floor. Both kinds of facts

> alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. **Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.**

Alleyne, 133 S. Ct. at 2158 (emphasis added).

Alleyne recognized the "obvious truth" that the floor of the mandatory term a defendant must serve was as important as its ceiling. Alleyne, 133 S. Ct. at 2160-61. As a result, setting a minimum term is now within the ambit of Apprendi and Blakely, so that any fact relied on to increase the minimum must be proven to a jury, beyond a reasonable doubt.

RCW 10.95.030 as amended by the so-called "Miller fix" and "Miller fix 2.0" laws runs afoul of these requirements and violates the Sixth Amendment, due process and our state's right to trial by jury. As relevant here, RCW 10.95.030 sets forth the penalties for aggravated first-degree murder as either life imprisonment without the possibility of parole or death, with specific provision for those whose crimes occurred when they were between 16 and 18 years of age:

> [a]ny person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old **shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years.** A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release.

Laws of 2014, ch. 130, §9, *codified as* RCW 10.95.030(3)(a)(ii)(emphasis added).

Thus, the presumptive sentence for an offender who was N.N.'s age at the time of the crime is a minimum term of "total confinement" of

no less than 25 years and a maximum term of life with the possibility of parole. A higher minimum term may be imposed, apparently up to "life," which would amount to a sentence of life without the possibility of parole.

Another new section set forth the factors which must be considered by the judge in deciding which sentence to impose:

> **[i]n setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth** as provided in Miller v. Alabama, 132 S.Ct. 2455 (2012), including but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.

Laws of 2014, ch. 130, § 9, *codified as* RCW 10.95.030(3)(b) (emphasis added).

As a result, in considering whether to impose something other than the presumptive sentence of 25 years minimum and a maximum of life with the possibility of parole, the Legislature required the judge to consider not a balance of mitigating and aggravating factors but solely the mitigating factors of youth as discussed in Miller, including those specifically laid out in the statute.

The statute improperly allows a judge - not a jury - to increase both the minimum and the maximum punishment from what is presumed - up to life without the possibility of parole - upon consideration of "factors." And further, the statute does not mandate that the judge's findings regarding any facts which support his decision are made beyond a reasonable doubt - or even put in writing. RCW 10.95.030(3)(b). As a result, RCW 10.95.030 violates due process and the state and federal

rights to trial by jury.

Although Miller has had "wide-ranging effect" nationwide, it appears that only one other court has thus far addressed the interplay of Miller with Alleyne. See People v. Skinner, __ N.W.2d __, 2015 WL 4945986 (2015). In Skinner, the court of appeals in Michigan addressed the constitutionality of that state's version of a "Miller fix," which required, similar to RCW 10.95.030(3), that the court "shall sentence" the defendant to a particular term for first-degree murder. __ N.W.2d at __ (slip op. at 5-6). Life without parole could be imposed, however, if the prosecutor filed notice and a hearing was held at which the court was required to consider the Miller factors. __ N.W.2d at __ (slip op. at 5-6).

The Skinner Court examined the role and purpose of the Sixth Amendment jury trial right in our country, noting it was "[t]o guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties.'" __ N.W.2d at __ (slip op. at 6), quoting, 2 J. Story, Commentaries on the Constitution of the United States 540541 (4th ed. 1873) (quoted in Apprendi, 530 U.S. at 477).

The court then concluded that, where the legislature creates a default sentence of less than life without the possibility of parole but allows an LWOP sentence to be imposed after consideration of the Miller factors, those factors must be proved beyond a reasonable doubt by a jury under Alleyne. See Skinner, __ N.W.2d at __ (slip op. at 6).

Just as the statute in Skinner, RCW 10.95.030(3) improperly authorizes a procedure which violates the state and federal rights to trial

by jury and to due process. Because the statute authorized the judge to make the findings on the relevant facts required to impose the higher minimum and maximum terms, it runs afoul of Alleyne. And on remand, because there is no procedure to empanel a jury to make the required findings and no inherent authority for a court to create such a procedure, N.N. must be sentenced to the presumptive term - 25 years minimum with a maximum of life with parole, the only sentence supported by the existing jury verdicts. See, e.g., State v. Pillatos, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007) (courts have no inherent authority to empanel juries to consider sentencing factors). This Court should so hold.

2. THE RESENTENCING COURT VIOLATED THE EIGHTH AMENDMENT, ARTICLE 1, SECTION 14, FUNDAMENTAL RULES OF STATUTORY CONSTRUCTION AND THE MANDATES OF MILLER IN ORDERING THE SENTENCES AND COUNSEL WERE PREJUDICIALLY INEFFECTIVE

The court's imposition of exceptional terms of life without parole on N.N. would also compel reversal even absent the Alleyne violations.

a. Recent changes in our understanding of not only psychological but physiological differences between adults and youth have fundamentally altered Eighth Amendment jurisprudence

To understand the issues, it is important to start with the juvenile justice system and our knowledge of juvenile offenders at the time when N.N. was sentenced to die in prison in 1995 and, again, by Judge Rumbaugh in this case. In the late 1980s and early 1990s, the concept of the juvenile "super-predator" was popularized by those such as former Princeton professor John Dilulio, who warned of "tens of thousands of severely morally impoverished juvenile super-predators" who were about

to burst onto society. See Lara A. Bazelon, *Note: Exploding the Superpredator Myth; Why Infancy is the Preadolescent's Best Defense in Juvenile Court,* 75 N.Y.U. L. REV. 159 (2000); see also, "Superpredators Arrive," Newsweek, Jan 21, 1996, *available at* http:///www.newsweek.com/superpredators-arrive-176848.

Lawmakers in the vast majority of states responded by amending juvenile laws to make it much easier for juveniles to serve what was termed "adult time for adult crimes." See Perry L. Moriarty, *Miller v. Alabama and the Retroactivity of Proportionality Rules,* 17 U. PA. J. CONST. L. 929, 933 (2015). By 1997, most states (including ours) had "automatic decline" or "automatic transfer" laws requiring certain juveniles or certain crimes (or combinations) to be tried automatically in adult court. See Craig Hemmens, Eric Fritsch and Tory J. Caeti, *Juvenile Justice Code Purpose Clauses: The Power of Words,* 8 CRIM. JUST. POL'Y REV. 221, 244-45 (1997). Most states also increased juvenile sentences, some even amending the very "purpose" clause" of their juvenile justice statutes to add themes less focused on the needs of the child and more on public safety and accountability. Id. And the number of adults and juveniles serving a term of life without the possibility of parole in the U.S. went from about 12,500 in 1992 to over 41,000 by 2008. Ashley Nellis and Ryan S. King, *No exit: The Expanding Use of Life Sentences in America* (2009, The Sentencing Project), *available at* http://www.sentencingproject.org/doc/publications/publications/inc_NoExitSept2009.pdf.

At this same time, the U.S. Supreme Court's 8th Amendment

jurisprudence also treated juveniles as "little adults." In 1989, it was still constitutional under the 8th Amendment for the government to put a person to death for a crime they committed between the ages of 16 and 18. See Stanford v. Kentucky, 492 U.S. 391, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989), overruled by, Roper v. Simmons, 543 U.S. 551, 561-63, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). And in fact, the plurality in Stanford rejected the idea that a juvenile's relative culpability was relevant or that a court conducting "proportionality review" under the 8th Amendment prohibition against cruel and unusual punishment had to examine the balance between the punishment imposed and the offender's blameworthiness. Stanford, 492 U.S. at 378-79. The same day it decided Stanford, the Court also found no Eighth Amendment impediment to imposing the death penalty on a person with developmental disabilities. See Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), overruled by, Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

A few years later, however, the Court switched gears. In Atkins, the Court reversed its decision in Penry. Atkins, 536 U.S. at 311. The Atkins Court embraced the concept of proportionality and held that what amounts to "excessive" punishment is in fact evaluated by current standards, so that 8th Amendment proportionality review must consider the evolving standards of decency in our "maturing society." 536 U.S. at 312.

Three years later, in 2005, the majority of the Court

reconsidered Stanford. supra. See Roper v. Simmons, 543 U.S. 551, 561-63, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). In Roper, the Court found that imposition of the death penalty on a juvenile offender who committed a death-penalty (capital) crime when she was between the ages of 15 and 18 was always, categorically, a violation of the Eighth Amendment prohibition against cruel and unusual punishment, in every single case. 543 U.S. at 569-70. Because of evolving knowledge of and research into the psychological and physiological development of youth, the Court was convinced that juveniles were by definition so much less culpable than an adult for committing comparable crimes that the ultimate punishment of death was always disproportionate to the crime and the offender when the offender was of that age. 543 U.S. at 569-70.

More specifically, the Roper Court recognized specific, appreciable and now proven differences in juveniles which direct affect their culpability for even the most heinous of crimes. 543 U.S. at 569-70. Youth suffer a "lack of maturity and an underdeveloped sense of responsibility," which can "often result in impetuous and ill-considered actions and decisions," the Court found. 543 U.S. at 569.

Further, juveniles are more vulnerable and "susceptible to negative influences and outside pressures, including peer pressure." 543 U.S. at 569. As a result, the Court noted, juveniles have a relative lack of control to resist criminality when encouraged or pressured by others, compared to an adult. And juveniles have much less control over their environments, as well. Id.

The Court also found that, developmentally, "the character of a juvenile is not as well formed as that of an adult." Roper, 543 U.S. at 569. The personality traits of youth are "more transitory, less fixed," the Roper Court noted, so that even those who commit the worst of unpardonable crimes as a juvenile cannot be said with confidence to be as incapable of change or incorrigible as one would deem an adult who committed the same acts. Id.

These facts led the Roper Court to find that even juveniles who commit the worst of crimes are by virtue of their age sufficiently less culpable *as an entire category* than adults to render imposition of the death penalty on them as cruel and unusual punishment, in violation of the 8th Amendment. Id. Because of their susceptibility to "immature and irresponsible behavior," the Court noted, the "irresponsible" conduct of a juvenile is not the same as adult. Id. Further, the Court found juveniles "still struggle to define their identity" so that it is "less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." Id. In addition, the deterrent and retribution goals of the death penalty were not served by imposing it even for "brutal crimes" committed by youth, because of the mitigating factors inherent in the nature of human development. Roper, 543 U.S. at 569-71.

Indeed, the Court declared that youth is a mitigating factor, because its "signature qualities" are usually transient, so that it would be "misguided to equate the failings of a minor with those of an adult." Roper, 543 U.S. at 570, citing, Johnson v. Texas, 509 U.S. 350, 368,

113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993).

By the time Roper was decided, it was clear that the dire predictions of a juvenile crime wave and super-predators were wrong; juvenile crime instead declined from 1997 to 2007. And indeed, even the greatest advocate of the "superpredator" theory recanted that belief. See Elizabeth Becker, "As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets," New York Times (Feb. 9, 2001), *available at* http://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html?pagewanted=print&src=pm.

Five years after it had struck down imposition of the death penalty for all juveniles, the Court extended the Roper analysis to a case involving imposition of a sentence of life without the possibility of parole for a youth crime. Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). In Graham, the Court followed Roper, this time finding that the 8th Amendment prohibition against cruel and unusual punishment forbade the imposition of a sentence of life without parole for a juvenile crime other than the most serious, homicide. Graham, 560 U.S. at 77-78. And again, the Court decided to impose a *categorical* ban, finding as a matter of constitutional law that the mitigating qualities of youth were so strong and affected culpability to such a degree that it was automatically disproportional and cruel and unusual punishment to impose life without parole in such a case. 560 U.S. at 78-79.

The Graham Court noted that evidence of the differences of youth it had discussed in Roper had only been reinforced by further

developments in psychology and brain science. Graham, 560 U.S. at 77-79. One of those developments was that it was now known that parts of the brain required for behavior control were *not* fully formed early and in fact "continue to mature through late adolescence." Id.

In addition, for the first time, in Graham, the Court crossed the so-called "third rail" and compared another punishment to death. 560 U.S. at 67-69. The Court noted that death and life with no hope of release "share some characteristics. . . shared by no other sentences," and found that life without parole means the state "deprives the convict of the most basic liberties without giving hope of restoration," making any good behavior or character improvement "immaterial." 560 U.S. at 70, quoting, Naovarath v. State, 105 Nev. 525, 526, 779 P.2d 944 (1989).

Again relying on proportionality, the Graham majority questioned the "penological justifications" for imposing a sentence of life without parole on someone who was a juvenile when a crime was committed. Graham, 560 U.S. at 71. Put simply, the Court declared, "[t]he characteristics of juveniles" make it "questionable" for a sentencing court to be able to conclude that a juvenile offender will "forever. . .be a danger to society" and is "incorrigible" - which is what is required in order to justify ordering him to die in prison. 560 U.S. at 71-72. The Court then categorically barred as cruel and unusual punishment the imposition of life without the possibility of parole for a juvenile crime other than homicide.

In creating a categorical bar against imposing life without parole

for any juvenile crime other than homicide, the Graham Court was concerned about drawing a "clear line," aware of the stark reality of how difficult it is to determine which very few offenders are so incorrigible and show "sufficient depravity" to justify the extreme sentence of life without parole. Graham, 560 U.S. at 70, 75. And the Court was unconvinced that courts which were engaged in the case-by-case analysis would be able to set aside the brutality or cold-bloodedness of any particular crime to see the crucial mitigating factors of youth. Graham, 560 U.S. at 77-78.

Ultimately, the Graham Court declared, "[a]n offender's age" is "relevant to the Eighth Amendment," and "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." 560 U.S. at 76.

The Court's recognition of the unique and transient characteristics of youth was not limited to the sentencing realm. See J.D.B. v. North Carolina, 564 U.S. __, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011). In J.D.B., the majority adopted a standard requiring consideration of the unique nature of youth when asking whether a defendant would have felt free to leave when talking to police. 131 S. Ct. at 2403. Citing Graham, the Court found that, because of such factors as inherent susceptibility to pressure, a teen could easily be overwhelmed by being in a police interrogation in a way and adult would not, so that "the differentiating characteristics of youth. . .universal" to all juveniles had to be taken into account. 131 S. Ct. at 2397.

Ultimately, the J.D.B. Court concluded, the question of whether a person is in custody had to include consideration of the perceptions and unique weaknesses of youth, because holding otherwise would be "to ignore the very real differences between children and adults" and "to deny children the full scop of the procedural safeguards" of the reading of the rights. 131 S. Ct. at 2405-2406.

In 2012, in Miller v. Alabama, supra, the Court again expanded our understanding of the fundamental differences of youth and found that the 8th Amendment prohibition against cruel and unusual punishment now prohibited automatic or mandatory imposition of life without the possibility of parole even for a youth who killed another human being. 132 S. Ct. at 2464. Again, the Court examined the developmental, psychological and physiological condition of youth as it affects our society's willingness to impose the harshest of punishments possible for a juvenile homicide crime. 132 S. Ct. at 2464.

In Miller, one of the defendants was 14 when he robbed a man he had been drinking and doing drugs with when the man fell asleep, then beat the man to death with a baseball bat after the man woke up, shouting, as he did, that he was "God." 132 S. Ct. at 2462-63. In an effort to conceal his crimes, he then returned to try to set the home on fire. Id. After his case was transferred to adult court, an automatic life without parole sentence was imposed and upheld in the state courts as "not overly harsh when compared to the crime." 132 S. Ct. at 2463.

The Supreme Court disagreed. Even though a juvenile court had examined specific factors like "mental maturity" and decided that

the defendant should be tried in adult court, the imposition of life without parole which then was an automatic result by definition not proportional to the offender and the offense. 132 S. Ct. at 2463.

Just as in Roper and Graham, again the Court reaffirmed that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders." Miller, 132 S. Ct. at 2464. It listed those attributes: immaturity, recklessness, vulnerability to outside pressures, inability to resist impulse and impetuousness among them. Miller, 132 S. Ct. at 2465. It noted their transitory nature, as well, just as it had in Roper. And again, the Miller majority reached the conclusion that the transitory attributes common to *all* youth by definition made their conduct less "blameworthy" than adults for 8th Amendment purposes. Miller, 132 S. Ct. at 2465.

Miller did not just rely on "what 'any parent knows'" but also on the same studies, research and "social science" that had proved so convincing in Roper and Graham. Miller, 132 S. Ct. at 2462. Indeed, the Miller Court found that evidence of "science and social science" had actually "become even stronger" since Roper and Graham. Miller, 132 S. Ct. at 2465 n. 5.

In Miller, the Court made it clear that these principles of the transitory attributes of youth apply to every youth, even one who commits the most heinous of crimes, because the "distinctive (and transitory) mental traits and environmental vulnerabilities" of juveniles are not "crime-specific." Miller, 132 S. Ct. at 2465.

Although it stopped short of adopting a categorical ban against imposition of life without parole for *every* juvenile convicted of homicide, the Miller Court cautioned that it can only be imposed for a homicide offense and, because of "children's diminished culpability and heightened capacity for change," "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." Miller, 132 S.Ct. at 2469. In fact, the Court described such occasions as limited to when a juvenile who has killed stands out from among all the other juveniles who have killed as the "rare juvenile offender whose crime reflects irreparable corruption." Miller, 132 S. Ct. at 2469, quoting, Roper, 543 U.S. at 573.

The Court then held that Eighth Amendment proportionality is violated by imposition of a life without parole sentence for a homicide committed as a youth unless the court deciding to impose such an unusual sentencing has first properly considered "offender's youth and attendant characteristics," which include:

> [the offender's] chronological age and its hallmark features - among them, immaturity, impetuosity, and failure to appreciate risks and consequences. . . family and home environment that surrounds him - and from which he cannot usually extricate himself - no matter how brutal or dysfunctional.. . the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. . .[and] that he might have been charged and convicted of a lesser offense if not for the incompetencies of youth - for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.

Miller, 132 S. Ct. at 2468.

Thus, in the time since N.N. was sentenced to mandatory terms

of life without parole for the aggravated murder counts in this case, Roper, Graham and Miller have fundamentally altered our understanding of the constitutionality of how we treat youth who commit crimes. No longer can they be put to death. No longer can they be sentenced to spend the rest of their lives without hope in prison for anything less than a homicide. And even for those who have committed that most atrocious crime, no longer can a death-equivalent sentence of life without parole be imposed unless a trier of fact has carefully considered all the mitigating qualities of youth and made the finding that the specific youth is one of the very few who is so incorrigible the life without parole can be deemed proportional under the Eighth Amendment.

b. Washington's amended laws

In 2014, in response to Miller, supra, our legislature amended multiple statutes, including RCW 10.95.030. See Laws of 2014, ch. 130. Prior to 2014, that statute set forth the only penalties for aggravated first-degree murder as either life imprisonment without the possibility of parole or death. See former RCW 10.95.030 (2013). Once death was taken off the table for juvenile crime, the only other option for aggravated murder was the imposition of life without the possibility of parole - leading to the automatic imposition of the sentence here.

The legislature also required that anyone who was sentenced to LWOP prior to June 1, 2014, "shall be returned to the sentencing court" or its successor "for sentencing consistent with RCW 10.95.030." Laws

of 2014, ch. 130, § 11. RCW 10.95.030 was amended to provide, in relevant part:

> [a]ny person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old **shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years.** A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release.

Laws of 2014, ch. 130, §9, *codified,* RCW10.95.030(3)(a)(ii)(emphasis added). Another new section required:

> **[i]n setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth** as provided in Miller v. Alabama, 132 S.Ct. 2455 (2012), including but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.

Laws of 2014, ch. 130, § 9, *codified,* RCW 10.95.030(3)(b) (emphasis added).

Thus, under RCW 10.95.030(3)(a)(ii), the presumptive sentence for N.N. who was 17 at the time of the crime is a minimum term of 25 years with life with the possibility parole as the maximum. And in making the decision whether to exceed that minimum sentence, the court was required to consider and weigh relevant factors, set forth in the "Miller fix" statutory scheme and Miller itself. RCW 10.95.030(3)(b).

c. The proceedings below

Below, the prosecutor repeatedly stated his belief that the purpose of the hearing was to allow N.N. to present evidence in mitigation. 1RP 4, 3RP 13-14, 36; CP 51-57, 69-73. According to the

state, it was N.N.'s role to present "sufficient mitigation" to prove he was somehow less culpable and deserved a lesser sentence than that originally imposed. See 1RP 4, 3RP 12-14, 36. The prosecutor also argued that the minimum the court could impose would be a 25-year minimum and life with parole maximum for each separate count. 3RP 6-7, 9-10, 27.

The court asked the parties to first address whether any sentences imposed would have to run consecutive or concurrent. For his part, the prosecutor applied the adult sentencing provisions on consecutive sentences, including RCW 9.94A.589, and argued that all of the sentences for all of the counts had to run consecutive to each other. 3RP 6-10. He refused to consider how that would impact N.N.'s total time in custody, claiming that counts III and IV, saying they were not relevant under Miller, that it did not matter if the result was "effectively a life sentence" and that Miller was not applicable to any crime other than life without the possibility of parole. 3RP 10.

In fact, he declared, the only actual requirement of Miller was that a person who committed a crime as a juvenile was given "an opportunity to show he should be released in his lifetime." 3RP 13. He said that the purpose of the hearing was to allow N.N. "the opportunity to present the mitigating circumstances" which was all that was constitutionally required. 3RP 13-14.

Defense counsel argued that it was irrelevant whether a life sentence was imposed as a single unit or by adding a number of mandatory stacking consecutive terms; neither was "okay" under

Miller. 3RP 22-23. He also argued that the judge could not impose life without parole under Miller unless he found N.N. "irreparably corrupt" and "beyond the pale of any kind of humanity." 3RP 22.

In ruling on the issue of consecutive/concurrent sentences, Judge Rumbaugh rejected the idea that stacking all of the sentences and running them so that N.N. would not be eligible for release for at least 72 years would not amount to a "life equivalent." 3RP 31. He gave no explanation for his reasoning, such as actuarial tables or anything similar. 3RP 30-31.

The judge was persuaded by the prosecutor's theory that running the sentences concurrently was the same as asking the court "to essentially ignore" the commission of all of the other crimes, i.e., giving a "free pass." 3RP 30-31. Further, Judge Rumbaugh said it was N.N. who had created the problem by committing more than one crime. 3RP 33.

Defense counsel confirmed that the court had ruled that, regardless of any other factors, the "minimum term" N.N. was facing was two consecutive 25-year minimum terms plus the sentences on the two assaults, for a total of at least 72 years without hope of parole. 3RP 33-34. Counsel then referred the court to the mitigation package and said he would say "nothing else" on his client's behalf. 3RP 34. He had no witnesses, either. See 3RP 34.

The prosecutor was surprised that N.N. had brought no witnesses to prove "any mitigating circumstances." 3RP 36. He also objected to significant portions of the defense mitigation package which

contained summaries of school documents and opinion of the mitigation specialist. 3RP 36-37. The judge agreed that the material was improper, told the prosecutor he should have made a motion to strike and assured the state that the judge was not really looking at what the mitigation specialist had written but rather the reports and letters attached to her report. 3RP 37.

In discussing the factors he said were relevant, the prosecutor started with the facts of the crimes, which he described as N.N. and his two friends having "decided they would arm themselves with an assault rifle and chase these four kids down." 3RP 29. He did not mention to the judge - who had not presided at the trial - that only O.I. was armed, or only O.I. was alleged to have fired the weapon, or that it was O.I. who went into the house, got the gun and ordered the other young men in the car, and that N.N. had been the driver. 3RP 28-29.

The prosecutor then gave his personal opinions about the devastating impact the crimes had on the victims' families and how unimaginable it was to think how the parents felt, "having your child essentially assassinated for throwing eggs at a house." 3RP 39. The prosecutor said he could not "come up with a more senseless or horrific crime" and that it "deserves the type of sentence" originally imposed. *3RP* 39. He also declared his belief that N.N. and and his friends had utter "disregard for human life," did not care about the risks and were upset at being disrespected. 3RP 39.

Judge Rumbaugh then agreed that the incident was "unimaginably horrible." 3RP 39. He thought he was required under

Miller to try to understand the "motivational or other factors" which had caused "such a sociopathic response to nothing." 3RP 39.

The prosecutor dismissed the Miller factor of age as essentially irrelevant. 3RP 39-41. His theory was that an 18 year old is considered adult, and N.N. was almost 18 at the time of the crimes, so it would be a "stretch" to suggest that N.N. was somehow different or less developed or culpable than an adult, due to his age. 3RP 39-41.

Next, the prosecutor distilled down N.N.'s entire social and family history to only a "single act in which his father is alleged to have hit him with a cord as some sort of discipline." 3RP 41-42. When the prosecutor minimized the incident as really about parental discipline, the court clarified the facts and police involvement and that bruises and welts had been seen. 3RP 41-42. The prosecutor then urged the court to apply a "continuum" and compare N.N. to other hypothetical youth, which the prosecutor declaimed had suffered more but not engaged in similar crimes. 3RP 42-43.

The incident in question had occurred when N.N.'s father had gotten angry when he saw N.N. playing with a child he thought had stolen from them, P.H. CP 249-50. The father chased both boys, dragged them into the house, bound their hands, stripped them to the waist and beat them with a coaxial cable, threatening to kill them. Id. P.H. suffered 5 or 6 slashes before N.N.'s father turned to his own child, inflicting about 30 lashes on him that P.H. saw before P.H. escaped out an open window and ran home. CP 249-50. Police who tried to investigate were prevented from seeing N.N. by his mom, who

claimed he was fine and ultimately told police he had gone to stay with a relative whose address she could not provide. CP 249-50.

Only a week or two later, N.N. was arrested for theft. Welts and marks were seen all over his body. CP 249-50. After Child Protective Services (CPS) was called, N.N. admitted that not only did his father beat him, his mother did, as well - with a broom handle. Id.

N.N. was then 11 years old. Id.

For the Miller factor asking about the degree of responsibility the youth was capable of showing, the prosecutor opined that N.N. "knew right from wrong." 3RP 43-45. He tried to dismiss the fact that N.N. had not gotten past fifth grade in school as probably N.N.'s own choice, but the court was not sure that a 10-year-old was solely at fault in that situation, instead of the parents, as well. 3RP 43-45. The prosecutor also said N.N.'s maturity was shown based on a "fact" that N.N. had stolen cars from rich people at some unspecified time so as not to harm poor people like himself, which the prosecutor said showed N.N.'s ability to be goal oriented. 3RP 43-45.

For the Miller factor of potential for rehabilitation, the prosecutor focused solely on N.N.'s behavior in custody. 3RP 46-47. He pointed to records he said showed N.N. had committed 34 "major infractions" over the years. 3RP 46-47. The prosecutor was suspicious of recent efforts, suggesting that N.N. showed "no signs of remorse in custody" until "he got wind" of his opportunity for a review in this case. 3RP 46-47.

Ultimately, the prosecutor faulted the defense for failing to

present evidence at the hearing "at least as far as very specific events that they are suggesting are contributing to the mental defect or his inability to act appropriately in this circumstance." 3RP 45. The prosecutor concluded that personally, there was "nothing that. . [he] could find" in N.N.'s mitigation package to "diminish his culpability" or prove "that he has any chance of rehabilitation." 3RP 45-47. He argued the judge should find the same. 3RP 46-47.

Counsel then declined to respond to any of the prosecutor's claims. 3RP 49. Instead, he said he was not going to spend time on "essentially a nullity," as the court has already imposed an effective life sentence even if it ordered the minimum terms. 3RP 49.

For a moment, counsel spoke of N.N.'s behavior in custody, saying that it could be explained by N.N. believing he was in prison for the rest of his life, "conformed his behavior in custody to that reality," and did what he needed to do to survive. 3RP 49. The judge then asked, "[a]ttacking corrections officers?" 3RP 49. Instead of answering directly, counsel just said that N.N. was "maintaining behavior without the hope of release in the future" but that if N.N. had something to work towards like a release date, he could correct himself. 3RP 49. Counsel also said N.N. had only "really actively considered what he needs to do to be on the outside" when he suddenly had a chance of release. 3RP 49.

R.F.'s father spoke about the huge emotional impact of the deaths and the resentencing, as well as the daily suffering from the loss. 3RP 50. He stated his opinion that anyone who committed such crimes

like N.N. would always be a danger to everyone. 3RP 50-51. He also told the judge that "the bottom line" for the families was that N.N. took their sons away and they did not want him ever released. 3RP 50.

N.N. apologized to the families. 3RP 51. He said he knew that there was a lot of pain and that it was because of his actions. 3RP 51. Then he did not know what else to say. 3RP 51.

In ruling, Judge Rumbaugh said he had read the background historical information about N.N., that he understood that N.N.'s parents had been oppressed by a genocidal regime, that N.N. had been born in a refugee camp and that his parents had come to the country with "new opportunity and hope before them, and then what happened," apparently referring to the crimes. 3RP 51-52. The judge noted that, in many cases, family, friends and coworkers are often shocked by "violent crimes . . . committed by offenders whose aberrant behavior is unforeseen and unforeseeable." 3RP 52.

But the judge then faulted N.N.'s family as responsible in part for his crimes, noting, "[N.N.] lived a childhood without much by way of family discipline" and that the family "contributed to" the incarceration of their loved one "[s]o that's on them." 3RP 53.

The judge agreed that there was evidence that N.N. had some cognitive defects, aside from just being a youth. 3RP 53. It was not clear, however, if the defects were based on "organic deficiencies" or "lack of education[.]" 3RP 53. The judge was also heavily swayed by the prosecutor's point that N.N. was "less than two months short of his 18th birthday, which would have made this entire procedure

unnecessary." 3RP 53-54.

For the question of whether N.N. was amenable to rehabilitation, the judge said it made no sense to look at the time of the crime. 3RP 54-55. Instead, he pointed to infractions in DOC, such as assault of an officer and "failure to comply with institutional rules." 3RP 55. For Judge Rumbaugh, those incidents showed more than just "not wanting to get up and go to work in the morning." 3RP 55. The judge said the DOC conduct made him "extraordinarily doubtful that any rehabilitation would be available" to N.N. 3RP 55.

Ultimately, Judge Rumbaugh was challenged by an inability to get beyond the heinous nature of the incident and crimes. He said:

> Despite my effort to gain understanding, [N.N.]. . . of your brutal and murderous rampage, **I am unable to perceive any rational basis for your morally bankrupt and sociopathic behavior.** You deserve, in the Court's opinion, to serve every day of the sentence that you have been given.

3RP 56 (emphasis added). The judge was especially concerned that no sentence he imposed would moderate the pain of the families, expressing his condolences for what he described as "the sense of emptiness that they must continue to feel." 3RP 56.

At the prosecutor's behest, no new judgment and sentence was filed. 3RP 57. Instead, the court signed an addendum, although the judge declared he had entered the "Judgment and Sentence, life without the possibility of parole on Count I and II, Count I and II to run consecutive, credit for time served, and count III and IV to be served thereafter." 3RP 56-58.

d. The sentences were imposed in violation of

RCW 10.95.030, due process,the Eighth Amendment and Article I,§ 14 and appointed counsel were prejudicially ineffective

The proceedings here fell far short of what was required to comply with the 8th Amendment requirements set forth in Miller, the mandates of RCW 10.95.030 and N.N.'s due process rights. Further, appointed counsel were ineffective in their handling of the issues below.

At the outset, the entire proceeding was flawed and in violation of RCW 10.95.030(3)(b) and Miller, because the judge used an improper effective presumption that life without parole would be imposed and further imposed a burden on N.N. to prove that he deserved something less. Under RCW 10.95.030(3)(a)(ii), an offender such as N.N. "shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years." While a "minimum term of life [without parole] **may** be imposed" the court is not allowed to impose such a sentence unless it "take[s] into account mitigating factors that account for the diminished culpability of youth" under Miller. RCW 10.95.030(3)(a)(ii) (emphasis added).

Thus, the presumptive sentence to be imposed for aggravated first-degree murder was a 25-year minimum and a life *with* parole maximum. Further, under RCW 10.95.030 and Miller, even in cases where the defendant has committed the most serious of crimes - homicide - he is not to be judged by that act alone.

Instead, the sentencer is required to "follow a certain process -

considering an offender's youth and attendant characteristics," the "Miller factors," which include such "hallmark features" as immaturity, impetuosity, failure to appreciate risks and consequences, vulnerability to peer pressure, inability to foresee potential results, the "circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him" and other "incompetencies of youth." Miller, 132 S. Ct. at 2468. The sentencing court must consider how all of those "transient" but very significant differences in the actual brains of youth which cause increased impulsivity, proclivity for risk and inability to assess the consequences of their acts militate against imprisoning them until they die, before imposing such a sentence. Id.

Interpreting Miller, one court has further described the requirements of "individualized sentencing" to include not only age and circumstances at time of the offense but also such things as the general "diminished culpability and heightened capacity for change" of juveniles, the family, home and neighborhood of the youth, his emotional maturity and development, the extent he was subjected to peer pressure, his past exposure to violence, drugs and alcohol, whether he was intoxicated at the time of the crime, his mental health history and his potential for rehabilitation. Commonwealth v. Knox, 50 A.3d 749, 768 (Pa. 2012), affirmed, 105 A.3d 1194 (2014).

Miller tasked courts with finding a way to differentiate between the juvenile offender whose homicide "reflects unfortunate yet transient immaturity" and that extremely rare juvenile whose life and crimes

show such "irreparable corruption" that they must be locked away from society forever, even as the immutable facts of youth fade with age. Miller, 132 S. Ct. at 2469, quoting, Roper, 543 U.S. at 573.

Further, the Miller Court made it clear that the imposition of life without parole on a juvenile convicted of killing another should almost never occur:

> [W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty ... of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the *rare* juvenile offender whose crime reflects irreparable corruption. Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

132 S. Ct. at 2469.

In this case, instead of engaging in the kind of consideration required under Miller and RCW 10.95.030(3), the court below instead adopted the prosecutor's theory that the purpose of the hearing was to allow N.N. to present "mitigation" evidence sufficient to meet some unnamed level of proof. The prosecutor repeatedly stated his belief that the parties were in court because N.N. was being given an opportunity to present evidence to *disprove* that he deserved life without parole, i.e., present "sufficient" evidence of "mitigation." See 1RP 4, 3RP 4-5, 13-14. Indeed, the prosecutor declared, allowing the defendant the chance to provide such evidence was all that Miller required before the court was authorized to order life without parole. 3RP 13-14. He presented similar arguments throughout his pleadings below. See CP 51-73. And

he faulted N.N. for not meeting this unspecified burden of proving "any mitigating circumstances" with witnesses and whether N.N. had proven his "diminished culpability" or that he was capable of reform. 3RP 34-36, 37.

Thus, he turned the hearing's purpose on its head. Instead of following the RCW 10.95.030(3) presumptive minimum term of 25 years to life with parole, the prosecutor urged starting from an effective presumption that life without the possibility of parole was not only proper but was going to be reimposed unless N.N. met some burden of proof. Instead of following the Miller mandate that even youth who have committed the most heinous crime of homicide will be unlikely to deserve life without parole, the prosecutor treated the hearing as effectively a rubber stamp of the previous unconstitutional sentencing decision, with the only change a chance for N.N. to somehow marshal such overwhelming evidence in his favor that it outweighed the enormity of the crimes. Indeed, the prosecutor faulted N.N. as failing to meet his burden because N.N. did not present evidence of " very specific events" that could be used to explain the crimes or which "contribut[ed] to the mental defect or his inability to act appropriately in this circumstance." 3RP 45.

And these views caught the judge in their sway. From early on in the hearing, Judge Rumbaugh established that he believed that, under RCW 10.95.030, he was authorized to impose life without the possibility of parole "if after balancing the mitigating factors **I find that there is insufficient evidence of mitigation."** 3RP 24 (emphasis added). And

throughout the proceedings, the judge referred to life without parole as a potential "appropriate sentence" which he could impose after considering all the relevant factors, as if the sentence was just one of equal choices instead of such an extreme option that it should be imposed only in the most rare of cases as Miller requires. 3RP24, 26, 30.

Every conclusion and finding Judge Rumbaugh made is flawed as a result. Under RCW 10.95.030, Judge Rumbaugh should have been applying the presumption of a 25 year minimum - life with parole maximum. And under the statute - and Miller- a life without parole sentence was neither a presumption nor even just another option - it was an extreme, rare and unusual sentence available only after careful and full consideration of the crucial mitigation of youth detailed at length in the Miller decision.

The question was not whether there was "insufficient evidence of mitigation." That *is* the question in a proceeding where, instead of seeking the death-equivalent penalties imposed here, the prosecution seeks actual death. See State v. Brown, 132 Wn.2d 529, 551, 940 P.2d 546 (1997). In such cases, however, the burden is on the prosecution to show that there are not sufficient mitigating circumstances to merit leniency. See id.

These errors standing alone would compel reversal. The way a court is tasked with deciding an issue is often dispositive of the result. See, People v. Guttierez, 58 Cal. 4th 1354, 324 P.3d 245, 171 Cal. Rptr.3d 421 (2014). Put simply:

[I]t is one thing to say that a court, confronting two permissible

> sentencing options, may impose the harsher sentence if it finds that sentence justified by the circumstances. It is quite another to say that a court, bound by a presumption in favor of the harsher sentence, must impose that sentence unless it finds good reason to do so. When the choice between two sentences must be made by weighing intangible factors, a presumption in favor of one sentence can be decisive in many cases.

Guttierez, 324 P.3d at 264-65. Here, Judge Rumbaugh started from a presumption in favor of reimposing life without parole. And he saw the hearing as the prosecutor urged - an opportunity for N.N. to rebut that presumption with "sufficient" evidence of mitigation. Because Judge Rumbaugh started from a wholly improper premise of the very purpose and scope of the hearing, his rulings do not withstand review.

Notably, even if our statute had actually provided for the system the prosecutor and court seemed determined to apply, it would be unconstitutional. A presumption that life without the possibility of parole will be imposed runs afoul of Miller if the determination of the court in deciding whether to impose a lesser sentence than life without parole "fails to give due weight to evidence that Miller deemed constitutionally significant before determining that such a severe punishment is appropriate." See State v. Riley, 315 Conn. 637, 653, 110 A.3d 1205 (2015), cert. docketed, __ U.S. __ (June 17, 2015); see Gutierrez, 324 P.3d at 267, quoting, Graham, 560 U.S. at 75 ("Graham spoke of providing juvenile offenders with a 'meaningful opportunity to obtain release' as a constitutional required alternative to - not as an after-the-fact corrective for - "*making the judgment at the outset* that those offenders never will be fit to reenter society") (emphasis in original).

These errors only magnified and exacerbated the other errors

below. And they were made all the worse by counsels' failures below.

Both the state and federal constitutions guarantee the accused the right to effective assistance of appointed counsel. Strickland v, Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); 6th Amend; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990), disapproved in part and on other grounds by, State v. Condon, 182 Wn2d 307, 343 P.3d 357 (2015). Counsel is ineffective even despite a presumption of effectiveness if his performance fell below an objective standard of reasonableness under the circumstances and his action or inaction cannot be viewed as legitimate strategy or tactics. See e.g., State v. Red, 105 Wn. App. 62, 66, 18 P.3d 615 (2001), review denied, 145 Wn.2d 1036 (2002).

In this case, counsel were prejudicially ineffective in their handling of these matters, in multiple ways. And these errors are no more clearly displayed than in the discussion - and ruling - on the Miller factors.

Below, it was the prosecutor who set the standard the court ended up using for the Miller factors. And this is because, after losing on the issue of whether the terms should run consecutive, counsel just gave up. 3RP 33-34. After confirming the court's ruling and that it meant N.N.

would be in custody for a minimum of 72 years (until he was 89), and confirming that the court had received the mitigation packet, counsel then said he would just rest on the submitted materials. 3RP 33-34.

And even after the prosecutor had engaged the court in lengthy discussion about his opinions on the case, when given the chance to respond, instead of doing so, counsel just declared it would be a "nullity" - effectively a waste of his time - and said nothing more. 3RP 49. Nor did cocounsel make any attempt to answer the prosecutor's claims about the Miller factors himself. See 3RP 49.

Thus, counsel abdicated their duties to N.N., allowing the prosecutor's incorrect claims about the mitigating attributes of youth and the Miller factors to take root without making even a token attempt to prevent it. 3RP 34. But even with their obvious discouragement at the court's initial ruling, counsel still had the opportunity - and duty - to advocate on behalf of their client. It is a fundamental rule that a judge can change her mind and an oral decision is not final unless and until it is reduced to writing. See State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (oral findings and conclusion have "no final binding effect, unless formally incorporated into the findings, conclusions and judgment"). Even if they assumed they would not win, appointed counsel had no way of knowing that, in making a passionate and considered argument on the Miller factors, the judge might not change his mind. See, e.g. State v. Dawkins, 71 Wn. App. 902, 863 P.2d 124 (1993).

Further, counsels' decision to give up left the prosecutor as the lone voice describing the Miller factors to the court. As a result, the court

adopted all of the prosecutor's mistaken claims and failed to properly consider *any* of the factors as required under Miller.

First, despite the plain language of RCW 10.95.030(3) requiring consideration of the Miller factors in all cases where the offender committed first-degree aggravated murder when under the age of 18, the prosecutor convinced the court to find the "age" factor of Miller essentially irrelevant, due to N.N.'s age. 3RP 39-41. The prosecutor posited a sliding scale, declaring that if N.N. "had been 14 years old at the time, the suggestion is that his brain is less developed," and he would be less culpable and less responsible for his actions. 3RP 40. Because he was almost 18 and thus almost an official adult, the prosecutor declared, N.N. was old enough that "that weighs against any sort of mitigation with respect to . . . N.N.'s culpability." 3RP 41.

And later, even though the judge had expressed doubt that the science indicated brain development was complete at age 18, "as if that is some magic landmark," the judge dismissed age as a mitigating factor under Miller, because N.N. was "less than two months short of his 18th birthday, which would have made this entire procedure unnecessary." 3RP 53-54.

Thus, the court failed to properly consider the Miller factor of age. Contrary to the prosecutor's claim, the "age" factor is not a scaled measure which goes up and down inverse to age; instead it requires the sentencing court to look at the offender's chronological age and the hallmark features of being a youth, which are "immaturity, impetuosity, and failure to appreciate risks and consequences." Miller, 132 S. Ct. at

2464. With this factor, the sentencing court must consider how being a youth and having those transient qualities affected the commission of the crime, with the understanding that "children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id.

Instead of conducting that analysis, Judge Rumbaugh treated N.N.'s age at the time of the crime as not really relevant because he was almost 18. But the Legislature specifically chose that age in fashioning the Miller fix. See Laws of 2014, ch. 130.

Further, it violates the mandates of Miller to dismiss the Miller factors because the youth is close to 18 at the time of the crimes. "Age" for Miller is not some direct ratio sliding scale of culpability which becomes full upon turning 18. Indeed, our Supreme Court recently so held. See, State v. O'Dell, __ Wn.2d __ , __ P.3d __ (2015 WL 4760476) (holding for the first time under Miller and our new understanding of the unique characteristics of youth that an offender older than 18 must be allowed to argue his youth as a mitigating factor in adult court); see also, State v. Seats, 865 N.W.2d 545 (Iowa, 2015) (rejecting the idea that someone who is 17 is somehow not entitled to the full considerations of the Miller factors).

Further, current science shows that the human brain continues to develop into the early 20s. See, State v. Null, 836 N.W.2d 41, 55 (Iowa, 2013); see also, Elizabeth S. Scott and Lawrence Steinberg, Rethinking Juvenile Justice 60 (2007) ("substantial psychological maturation takes place in middle and late adolescence and even into early adulthood").

Indeed, the prevailing belief in the 1990s - that adolescent brain maturation was "largely complete in early childhood" - was debunked in a landmark study at the end of that decade. See e.g.,Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice,* 5 NOTRE DAME L. REV. 89, 98 (2009). Since then, neuroscience has consistently shown that structural brain maturation is incomplete even at 18. See id. For example, the prefrontal cortex which controls much of decision making and impulse control is not fully developed until the early 20s. See Kathryn Lynn Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency*, 32 LAW & HUMAN BEHAV. 78, 89-90 (2008).

In fact, some theorists have called for rethinking the arbitrary age of 18 as evidence of being a full adult because of the continued physiological immaturity into the early 20s. See Maroney at 152-53. Thus far, however, criminal justice statutes have yet to depart from the age of 18 age as having a "societal consensus as to its significance." Maroney, *False Promise,* at 152-53.

Thus, even at age 17, a youth is still immature in physiological and development terms -in ways likely to affect their decisions about involvement in a crime. See Seats, 865 N.W.2d at 556-57. And "[i]n light of the science, the fact that a defendant is nearing the age of eighteen does not undermine the teachings of Miller." Seats, 865 N.W. at 557.

Judge Rumbaugh essentially ignored the mitigating factors of youth because N.N. was 17 at the time of the crimes. This violation of the mandates of Miller alone would compel reversal, even if the court had

used the proper standard and not saddled N.N. with a burden not his to bear.

The second Miller factor required the court to look at the family and home environment of the youth. Miller, 132 S. Ct. at 2468. And again, the prosecutor urged the wrong standard. He dismissed the evidence of abuse by N.N.'s dad as "discipline" issues and his lack of schooling past fifth grade as probably due to his own choice. 3RP 43-44. More important, he successfully convinced the court to adopt the theory that, because other hypothetical children had suffered worse trauma but not committed similar crimes, "nothing" in N.N.'s family history would be sufficient "mitigation" of culpability for the crimes. 3RP 43-45.

Thus, again, the prosecutor converted a mitigating Miller factor into akin to an aggravator, effectively faulting N.N. for not having a life horrendous enough to somehow explain away the inexplicable crimes in which he took part. The clear implication was that unless N.N. proved he suffered extremely as a child as compared with a hypothetical youth, there should be no consideration of what he did suffer as mitigating.

But the purpose of the Miller factors is not to find some specific incident in the youth's past which was sufficiently egregious to excuse his acts. Under Miller, for this factor, the lower court was required to consider "the family and home environment that surrounds" N.N., looking at "environmental vulnerabilities" like whether there was evidence of childhood abuse or neglect, familial substance abuse, lack of adequate parenting, lack of education, prior exposure to violence and other relevant factors. See Miller, 132 S. Ct. at 2465-69. The point is for

the court to determine the "family and home environment vulnerabilities" of the offender and how those, together with lack of maturity, likely affected his conduct, in order to cast light on the 8th Amendment proportionality analysis. Id.

Research confirms the influence of the family and environmental factors such as neighborhood and school on youth offending behavior. See Howard N. Snyder & Mellisa Sickmund, *Juvenile Offenders and Victims: 2006 National Report* at 71-72 (U.S. Dept. Of Justice, Office of Juvenile Justice and Delinquency Prevention, 2006), *available at* http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf. Further, childhood exposure to abuse or maltreatment, peer victimization and community violence have all been shown to be connected to problem behavior, mental health issues and even developmental disabilities. See David Finkelhor et al, *Children's Exposure to Violence, Crime and Abuse: An Update,* Juvenile Justice Bulletin Sept. 2015 (U.S. Department of Justice Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, 2015), *available at* http://www.ojjdp.gov/pubs/248547.pdf.

Applying this factor here, there was ample evidence to show how N.N.'s family and environment contributed to the commission of the crimes in light of the mitigating factors of youth. N.N. lived in poverty and after his father left, in a single parent family - a risk factor, as kids in such a family are 50% more likely to engage in violence, as are kids who are abused. See Snyder, *Juvenile Offenders and Victims,* at 54-64. He did not have a positive social structure at school, having dropped out in

fifth grade. At age 11 his father beat him so hard with a cable that it left raised welts all over his body visible a week later. His mother then prevented him from being found by those trying to help him. And he told investigators at that time about her beating him, too.

The abuse, the lack of proper structure in the form of school of adequate parenting, the gang influence, the poverty - all of these facts militate against finding that N.N. was that rare youth homicide offender so corrupt and beyond hope that a death-equivalent sentence may be imposed without offending the 8th Amendment proportionality mandates. And again, by failing to argue the crucial points in N.N.'s history at the hearing, counsel threw away their chance to convince the court to the contrary.

The third Miller factor requires the court to examine "the circumstances of the homicide offense, including the extent of [the juvenile's] participation in the conduct and the way. . .peer pressures may have affected him." Miller, 132 S. Ct. at 2468. Counsel said nothing about this factor below. Instead, they let the prosecutor's version of events prevail, which described the crimes as N.N. and his two friends having "decided they would arm themselves with an assault rifle and chase these four kids down." 3RP 29. And they did not respond to the prosecutor's declarations of his personal belief that he could not think of "a more senseless or horrific crime," or his opinions about what the crimes meant:

> [N.N.]. . .and his friends had complete and utter disregard for human life. They had disregard for what they were doing. They didn't care. They were going to show these

> folks that they were not going to be disrespected. And that was their manner of doing it.

3RP 39.

Counsels' failure to respond on this factor is unfathomable. Indeed, it is difficult to imagine a case in which explanation by counsel was more crucial. The crimes are exactly the type most likely to invoke the most fear and loathing in the community and courts. A street gang of youth with access to a gun. Teen victims with no gang association whose stupid decision to engage in malicious mischief went horribly awry. O.I. perceiving a threat or "diss" to the gang and getting a gun to solve it. The cars driving through the street with O.I. firing. And children killing other children with a gun.

But the same facts which make the crimes so terrifying and horrific point directly towards the Miller factors and the defects of youth, rather than serving as evidence of complete corruption of N.N.. The "transient rashness, proclivity for risk, and inability to assess consequences." Miller, 132 S. Ct. at 2465. The inability to resist peer pressure, lack of foresight, acting without thought, deficiencies in decision making. 132 S. Ct. at 2464-66. All of these unique - and transient - weaknesses of youth - feature in the excruciating errors committed by N.N. in participating in the crimes that day. See Miller, 132 S. Ct. at 2465.

And all of those features - and fears of juvenile crime - are magnified beyond measure when a criminal street gang is involved. The specter of such gangs is so inherently prejudicial that it is known to

improperly invite a fact-finder to decide guilt based on propensity as a "bad character" for being a member. See, e.g., State v. Asaeli, 150 Wn. App. 543, 208 P.3d 1136, review denied, 167 Wn.2d 1001 (2009). Instead of recognizing the crucial need to explain the horrific, senseless nature of the crime in light of the Miller factors, however, counsel said nothing.

They could have explained how the gang context magnifies both the weaknesses and vulnerabilities of youth in significant ways. See Emma Alleyne and Jane L. Wood, *Gang Involvement: Psychological and Behavioral Characteristics of Gang Members: Peripheral Youth and Nongang Youth*, 36 AGGRESSIVE BEHAV. 423, 424 (2010) (noting how different factors of the gang environment could affect the ability of a member to assess risk).

They could have cited the ample studies about the reasons youth like N.N. feel the need to join gangs, such as the commonality of a perceived need for protection, or troubled home situations where their sense of individual worth has not been nurtured, leaving them more susceptible to the need for "belonging," satisfied by the gang. See Finn-Aage Ebsbensen, *Preventing Adolescent Gang Involvement*, JUV. JUST. BULLETIN (September 2006) at 1.5. Counsel could have shared with the court how the enhanced need for belonging to a gang has been found to make it especially hard for a gang member to resist peer pressure from another gang member, even to engage in criminal behavior. See id. Counsel could have cited any of the cases in this state in which experts have discussed how for gangs, the penultimate goal is perceived

"respect," with the force of that need so strong that they engage in criminal behavior and carry guns to enforce it. See, e.g., State v. Ra, 144 Wn. App. 688, 175 P.3d 609, review denied, 164 Wn.2d 1016 (2008).

Gang membership has a strong effect on social development, creating a norm of antisocial and often illegal behavior which then affects the ability of a youth to properly evaluate risk. Finn-Aage Ebsbensen, *Preventing Adolescent Gang Involvement*, supra. Indeed, extreme violence can be an integral part of criminal street gang culture such that using it can increase status. See, State v. Boot, 89 Wn. App. 780, 788-89, 950 P.2d 964, review denied, 135 Wn.2d 1015 (1998). Police experts testify that "gang members maintain their status by retaliating" when anyone encroaches on their "territory," with violence. See, State v. Johnson, 124 Wn.2d 57, 64-66, 73, 873 P.2d 514 (1994); State v. Bluehorse, 159 Wn. App. 410, 246 P.3d 537 (2011). A gang member shows "disrespect" to a rival gang simply by being there, or "throwing gang signs" i.e., making some gesture or symbol. See Johnson, 124 Wn.2d at 65-66.

As tragic, criminal and frightening as it was, the incident resulting in the crimes in this case is still akin to the kinds of crimes seen in similar cases where there are gang members involved. See, e.g., Johnson, 124 Wn.2d at 64-66 (shooting next to public elementary school where kids were about to be released; children so afraid now they will not go to school); State v. Embry, 171 Wn. App. 714, 287 P.3d 648 (2012), review denied, 177 Wn.2d 1005 (2013) (a "beef" between gang members and a person inadvertently kicking one gang member's shoe seen as such

disrespect that the person is gunned down in a parking lot later that night); State v. Yarbrough, 151 Wn. App. 66, 210 P.3d 1029 (2009) (shots fired outside an underage dance club leaving one dead; dispute over territory and perceived slight). The stupidity and lack of foresight, the criminal failure to think about potential consequences, the limited ability to resist acting on impulse, or peer pressure are all emphasized in this kind of incident, exacerbating the vulnerabilities of youth all the further.

Counsel made none of these points below. Nor did they remind the court that N.N. was convicted of first-degree aggravated murder as an accomplice. They did not ensure the court knew that it was O.I., not N.N., who ran into the house after the egging and grabbed the gun and O.I. who then ordered the other young men into the car, exhorting them to pursue. Most significant, it was O.I., not N.N., who pointed the gun out the window and pulled the trigger, firing the shots which killed.

Yet when a defendant is involved in a killing as an accomplice, his culpability is by definition lessened for 8th Amendment purposes. See Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1987).

N.N.'s crimes were likely strongly influenced by the transient attributes of youth as further magnified through the gang culture. And they cast light on N.N.'s lessened culpability for his lesser role. But without argument and support on those points, the court was left struggling to overcome the incredible emotional weight of the crimes and the fear and revulsion they invoked.

The analysis on the fourth factor was equally flawed and counsel's

performance equally poor. The factor requires the court to look at the inherent potential for change within *all* youth offenders who commit homicide. Miller, 132 S. Ct. at 2468-69. Here, the court made no such inquiry, instead adopting the prosecutor's claim that the only relevant question was how N.N. had behaved in prison. 3RP 46-67, 54-55. For the judge, the list of DOC offenses indicated an attitude the judge thought showed more than just "not wanting to get up and go to work in the morning" but rather something which made the judge doubt rehabilitation would work. 3RP 47, 54-55.

Once again, however, the court's focus was wrong. The Miller factor of potential for rehabilitation is not about whether, once condemned to die in prison, a youth offender acted out. It is about the inherent potential for rehabilitation that *every* youth has because of the specific and now accepted developmental differences caused by that youth. The Miller Court established this factor based on the brain science and other evidence showing that the character of a youth is transient and not well formed, so that the traits such as unique inability to resist peer pressure and being unable to foresee or understand consequences before acting are very likely to change with age. See Miller, 132 S. Ct. at 2469.

And again, counsel were ineffective. While one made a token effort to argue that N.N.'s conduct in prison reflected more his lack of hope in the future, he backed down the moment the judge questioned that claim.

But it must have been clear in advance that N.N.'s prison record would be used against him in the prosecution's effort to rebut the Miller

presumption that *all* youth are capable of redemption. Counsel were clearly unprepared to address the prison record with anything other than off-the-cuff declarations.

In any event, acting out in prison when you are serving a life sentence is not necessarily evidence of irredeemable corruption. See Graham, 560 U.S. at 73-74 (recognizing that someone who "knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual).

Judge Rumbaugh's decision was made applying the wrong standard, and an improper presumption, and without proper consideration of the Miller factors. Ultimately, the judge was incapable of seeing beyond the brutal crimes and how he could not "perceive any rational basis" for the "morally bankrupt and sociopathic behavior" of that day. 3RP 56.

There is no question that a shooting such as the one which occurred in this case is almost incomprehensible to adults and kids alike. But the facts of this case show that N.N.'s participation in the crime is not evidence of "irreparable corruption" but rather of the transient qualities of youth. He did not grab the gun. He did not load it. He did not level it out the window at the car ahead and repeatedly fire shots, killing two other teens. Those acts were committed by O.I., with N.N. as the driver of the car. N.N. is not blameless for his actions on that fatal day. But he was entitled to full and fair consideration of the mitigating factors of youth, and to effective assistance, neither of which he received.

Judge Rumbaugh's initial decision to run all of the counts

consecutive also runs afoul of the prohibitions against cruel and unusual punishment under Miller. With his ruling, the judge adopted the narrowest possible view of Miller. But courts across the country which have looked at this issue have held that it is a violation of the 8th amendment for a court sentencing a person who committed crimes as a child to impose non-discretionary sentences which amount to effective life even if that person committed multiple crimes. See, e.g., Henry v. State, __ So.3d __ (Fla. 2015) (2015 WL 1239696); Casiano v. Comm'r of Corrections, 115 A.3d 1031, 317 Conn. 52 (2015); Bear Cloud v. State, 334 P.3d 132, 144 (Wyo. 2014); Moore v. Biter, 725 F.3d 1184, 1186 (9th Cir. 2013), on rehearing, 742 F.3d 917 (2014); State v. Null, 836 N.W.2d 41, 71 (Iowa 2013); People v Caballero, 55 Cal.4th 262, 265, 282 P.3d 291 (2012). They have recognized that, just as Graham expanded Roper and Miller expanded Graham, the fundamental underpinnings of Miller are not limited to the technicalities but instead concerned with the actual sentence the defendant will serve. As one court declared:

> In the end, a government system that resolves disputes could hardly call itself a system of justice with a rule that demands individualized sentencing considerations common to all youths apply only to those youths facing a sentence of life without parole and not to those youths facing a sentence of life with no parole until age seventy-eight.

State v. Ragland, 836 N.W.2d 107, 121 (Iowa 2013). The Supreme Court's continued expansion of the principles of the 8th Amendment in this context in Roper, Graham and Miller, shows that the fundamental nature of our understanding of the culpability of youth transcends the

specific crime or even the specific sentence and looks instead at the result. Put another way, the lack of hope imposed as a result of imposition of a death-equivalent, life without parole sentence on a juvenile does not become less extreme just because the sentence results from imposition of a single term of mandatory life or a number of stacking terms which all add up the same. The lower court erred in refusing to apply the Miller concepts to the imposition of an effective sentence of life without parole caused by adult consecutive sentencing statutes and this Court should so hold.

On remand, new counsel should be appointed and the case should go before another judge, to ensure the appearance of fairness and N.N.'s basic rights. Counsels' performance below might have been sufficient if the case was just another felony sentencing. But it was not. Life without parole is akin to death when imposed on a juvenile and thus is a death equivalent. See Graham, 560 U.S. at 77-78. And it is at best an open secret that those sentenced as juveniles and facing life in prison often despair to the point of killing themselves at the prospect of no hope for any future outside the prison walls. See Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 Wake Forest L. Rev 681, 712, n 141-47 (1998) (discussing "psychological toll" of LWOP).

The hearing below was the first chance N.N. had ever had for actual consideration of his true culpability for Eighth Amendment disproportionality purposes. While counsel made some filings, those filings fell far, far short, given the magnitude of the case. They filed a

"mitigation packet" which was improperly prepared so that the court did not consider its bulk. They cited no studies on juvenile development, or gangs, or how this type of crime might fall well within the Miller mitigating factors.

Further, they made almost no effort at the hearing. They called not a single witness in N.N.'s support. They presented no testimony from an expert on gangs, or child development, or anything similar to help the court see beyond the atrocities of the crime and help it fully, fairly evaluate the Miller factors. Counsel were ineffective in abdicating their responsibilities to their client and failing to adequate represent him at the resentencing. On reversal, N.N. is entitled to new counsel.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 12th day of October, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel via this court's portal upload at Pierce County Prosecutor's Office at pcpatcecf@co.pierce.wa.us and to N.N., first-class postage prepaid at N.N., DOC 738114, WSP, 1313 N. 13th Ave., Walla Walla, WA. 99326.

DATED this 12th day of October, 2015.

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